SUPREME COURT, U. S.

Office - Supreme Court, U.S.
FILED
APR 23 1958
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1957

No. 348

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES, S. A., ETC.,
Petitioner

v.

WILLIAM P. ROGERS, Attorney General of the United States, as Successor to the Alien Property Custodian, and IVY BAKER PRIEST, Treasurer of the United States,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITIONER'S REPLY BRIEF

ROGER J. WHITEFORD
JOHN J. WILSON
HUBERT A. SCHNEIDER
Attorneys for Petitioner
815 - 15th Street, N. W.
Washington 5, D. C.

Of Counsel:

PEIDER KONZ
WILLIAM E. ROLLOW

April 1958

INDEX

Page

STATEMENT OF THE ISSUES PRESENTED BY RESPONDENTS' BRIEF 1

I. THE DISCOVERY ORDER BELOW IS NOT SUPPORTED BY EVIDENCE OR FINDINGS EITHER OF CONTROL OR OF VIRTUAL IDENTITY OF PETITIONER AND THE SWISS BANK; MOREOVER VIRTUAL IDENTITY IS NOT THE TEST 5

The District Court has made no findings of fact on control. Its conclusions to that effect are unfounded 5

II. RESPONDENTS' "INDISPENSABILITY" ARGUMENT IS A FIGMENT; TRIAL ON THE MERITS WILL NOT PREJUDICE THEM 12

1. Respondents' argument ignores the existence of available data 12

2. Full investigation of the Sturzenegger records is possible 15

3. The trial court has power to protect respondents by inferences drawn in the course of trial on the merits 17

III. SWISS LAW HAS NOT BEEN OFFERED AS AN EXCUSE FOR NONPRODUCTION; INDEED FULL DISCOVERY IS POSSIBLE UNDER SWISS PROCEDURES 18

1. Effect and place of Swiss Law in the case at bar 18

2. Swiss Law in the case at bar is not a procedural rule of privilege; it is a fact to be considered in determining absence or presence of control 20

IV. THE DISMISSAL ORDER CANNOT BE SUPPORTED BY ANY OF THE SOURCES OF POWER RELIED UPON .. 25

APPENDIX 1a

Table of Cases

Page

American Communications Asso. v. Douds, (1950) 339 U.S. 382, 407 28
American Lithographic Co. v. Werckmeister, (1911) 221 U.S. 603 30
Anatoli, The (France) J. O. August 23, 1917, 6741 24
Antilla, The, (1918) 7 LL.P.C. 401 ..... 22, 23
Baron Sternjblad, The, (1918) A.C. 173, 178, 179 ..23, 24
Baumgartner v. United States, (1944) 322 U.S. 665, 670-71 9
Beck v. Clark (D.C. Conn. 1945) 88 F. Supp. 565, affd. *sub. nom.* Beck v. McGrath, 2d Cir. (1950) 182 F. 2d 315 4
Bermuda, The, (1866) 3 Wall. 514 22
Blake v. DeVilbiss Co. (6th Cir. 1941) 118 F. 2d 346 ... 31
Boling v. United States, (9th Cir. 1956) 231 F. 2d 926-928 30
Bravo, The, P.C. (Oct. 17, 1917) Official Trial Notes, by Sir Samuel Evans 24
Brookdale Mill, Inc. v. Rowley, (C.A. 6th 1954) 218 F. 2d 728 31
Campbell v. Johnson (S.D. N.Y. 1951) 101 F. Supp. 705 31
Carnegie Natl. Bank v. City of Wolf Point, (9th Cir. 1940) 110 F. 2d 569 30
Clark v. Uebersee Finanz-Korp., (1947) 332 U.S. 480. .33, 34
Cleary Bros. v. Christie Scow Corp., (2d Cir. 1949) 176 F. 2d 370 31
Cold Metal Process Co. v. McLouth Steel Corp., (C.A. 6, 1942) 126 F. 2d 185, 188 17
Cole v. Cunningham, (1890) 133 U.S. 107, 117-119 25
Colonial Drive In Theatre, Inc. et al. v. Warner Bros. Pictures, Inc. (Feb. 13, 1958, S.D. N.Y.) 25 F. Rules Serv. 41.b.11, Case 5 31
Comstock v. Group of Institutional Investors, (1948) 335 U.S. 211 9
Consul Corfitzon, The, (1917) A.C. 550 ..... 21, 22
Cummings v. The State of Missouri, (1866) 4 Wall. 277 27
Deauville Associates, Inc. v. Eristavi-Tchitcherine, et al., (5th Cir. 1949) 173 F. 2d 745 32
Delphy v. Bernuth Lembcke Co., (2d Cir. 1954) 217 F. 2d 301 31

Page

Duell v. Duell, (C.A. D.C. 1949) 85 U.S. App. D.C. 78, 83, 178 F. 2d 683 ..... 27, 31
Dulansky v. Iowa-Illinois G. & E. Co., (C.A. 8, 1951) 191 F. 2d 881 10
Feller v. McGrath, (D.C. Pa. 1952) 106 F. Supp. 147, aff'd *sub. nom.* Feller v. Brownell, 201 F. 2d 670 .. 4
First Iowa Hydro Elec. Coop. v. Iowa-Illinois Gas and Elec. Co., (8th Cir. 1957) 245 F. 2d 613, 628 ..... 29, 30
Galena Oaks Corp. v. Scofield, (5th Cir. 1954) 218 F. 2d 217 9
Graver v. Linde, (1949) 336 U.S. 271 9
Hammond Packing Co. v. Arkansas, (1909) 212 U.S. 322 ..... 25, 26, 27, 29, 31
Haskell v. Philadelphia Transportation Co. (1956 E.D. Pa.) 19 F.R.D. 356 31
Heikkinen v. United States, 355 U.S. ——, (No. 89, dec. Jan. 6, 1958) 2 L. Ed. 2d 264 ..... 27, 28
Hicks v. Bekins Moving & Storage Co., (9th Cir. 1940) 115 F. 2d 406 30
Holzer v. Deutsche Reichsbahn-Gesellschaft (N.Y. C.A. 1938) 277 N.Y. 474, 14 N.E. 2d 798 21
Hovey v. Elliott, (1897) 167 U.S. 409 .... 25, 26, 27, 29, 31, 32
Hyam v. American Export Lines, Inc. (2d Cir. 1954) 213 F. 2d 221 ..... 10, 32
In re Harry J. Reicher, —— F. Supp. ——, (D.C. S.D. N.Y., dec. Feb. 25, 1958) 11
Interhandel Case, I.C.J. Reports 1957, p. 105 5
Jefferson v. Stockholders Publishing Co., (9th Cir. 1952) 194 F. 2d 281 31
Jones v. Union Guano Co., (1924) 264 U.S. 171 ..... 31, 32
Kronprins Gustav Adolf, The, 6 LL.P.C. 244 ..... 22, 24
Kronprinzessan Margareta, The, (1921) 1 A.C. 486 ... 23
Kronprinzessan Victoria, The, (1919) A.C. 261, 268 .. 23
Livingstone v. Hobby, (1954, E.D. Pa.) 127 F. Supp. 463 31
Machinoimport, V.O., v. Clark Equipment Co., (S.D. N.Y. 1951) 12 F.R.D. 191 31
Maria, The, (No. 3) (1805) 5 C. Rob. 365 22
Massie v. Watts, 6 Cranch, 148 25
McCullough v. Virginia, (1898) 172 U.S. 102 28
McVeigh, William N., v. United States, (1871) 11 Wall. 259 34

Page

Montgomery v. Hutchins, (9th Cir. 1941) 118 F. 2d 661, 665 17
Mooney v. Central Motor Lines, Inc., (6th Cir. 1955) 222 F. 2d 569 31
National Union v. Arnold, (1954) 348 U.S. 37 ..... 30, 31, 32
Orvis v. Higgins, (2d Cir. 1950) 180 F. 2d 537, 538, cert. den. 340 U.S. 810 9
Peckham v. Ronrico Corp., (C.A. 1st, 1948) 171 F. 2d 653, 657 10
Phelps v. McDonald, (1879) 99 U.S. 298, 307, 308 25
Producers' Releasing Corp. de Cuba v. P.R.C. Pictures (2d Cir. 1949) 176 F. 2d 93 31
Red Warrior Coal & Mining Co. v. Boron, (3d Cir. 1952) 194 F. 2d 578 31
Refior v. Lansing Drop Forge Co., (6th Cir. 1942) 124 F. 2d 440 30
Re Von Kantzow's Patent (1944) Ch. D. 318 24
Ross v. True Temper Corp. (N.D. Ohio 1951) 11 F.R.D. 307 31
S.E.C. v. Minas de Artemisa, S.A., (1945) 150 F. 2d 215 25
Saginaw Broadcasting Co. v. Federal Communications Commission, (1938) 68 App. D.C. 282, 287, 96 F. 2d 554, 559, cert. den. 305 U.S. 613 ..... 8a
Salton Sea Cases, The, 172 F. 792 25
Sanib v. United Fruit Co., (S.D. N.Y. 1955) 19 F.R.D. 9 31
Service Liquor Distributors, Inc. v. Calvert Distillers Corp., (D.C. N.Y. 1955) 16 F.R.D. 513 16
Sibbach v. Wilson & Co., (1941) 312 U.S. 1 28
Sinclair v. United States, (1929) 279 U.S. 263, 299 ..... 27, 28
Skiriotes v. Florida, (1941) 313 U.S. 69, 73 25
Societe Internationale, etc. v. Brownell, 355 U.S. 812 .. 1
Steele v. Bulova Watch Co., Inc., (1952) 344 U.S. 280 .. 25
Stoehr v. Wallace, (1921) 255 U.S. 239 33
Sturchler v. Hicks, (D.C. N.Y. 1926) 17 F. 2d 321 4
Syracuse Broadcasting Corp. v. Newhouse (Jan. 10, 1958, N.D. N.Y.) 25 F. Rules Serv. 41.b.13, Case 1, —— F. Supp. —— 31
Textile Products v. Formax Mfg. Corp. (E.D. Mich. 1952) 13 F.R.D. 302 31
United States v. Congress of Industrial Organizations (1948) 335 U.S. 106, 120, 121 28

Page

United States v. U.S. Gypsum Co., (1948) 333 U.S. 364, 395 9
United States v. Murdock, (1933) 290 U.S. 389 ..... 27, 28
United States v. Spector, (1952) 343 U.S. 169 28
Von der Heydt v. Rogers, (1958) —— U.S. App. D.C. ——, 251 F. 2d 17 11
Von Zedtwitz v. Sutherland, (1928) 58 App. D.C. 153, 26 F. 2d 525 4
Washington-Southern Nav. Co. v. Baltimore & P.S.B. Co., (1924) 263 U.S. 629, 635 10
Zielinski v. United States, (2d Cir. 1941) 120 F. 2d 792-3 30

STATUTES

Section 5(b), Trading with the Enemy Act, 50 U.S.C. App. 5(b) 33
Section 9, Trading with the Enemy Act, 50 U.S.C. App. 9 33
Section 17, Trading with the Enemy Act, 50 U.S.C. App. 17 ..... 29, 33

RULES

Rule 30(b), Federal Rules of Civil Procedure 20, 25
Rule 34, Federal Rules of Civil Procedure 20, 28, 32
Rule 37, Federal Rules of Civil Procedure 26, 30, 31
Rule 37(b)(2), Federal Rules of Civil Procedure 1, 17, 27, 28, 29, 32
Rule 41, Federal Rules of Civil Procedure 29, 30, 31

TREATISES AND ARTICLES IN PERIODICALS

American Journal of International Law (1957) Vol. 51, No. 3, p. 517 4
Baty, Continuous Voyage as Applied to Blockade and Contraband, Transactions of Grotius Society, Vol. 20 (1935), p. 140 22
Colombos, Law of Prize, 2d Ed. 1940, pp. 182, 196-199 ..... 20, 22, 23, 24
Deak & Jessup, Doctrine of Continuous Voyage, 7 Tulane L. Rev. 388 (1933) 23
Halsbury's Laws of England, 3d Ed. 1955, Vol. 12, p. 2 22
Wigmore on Evidence 3d Ed. (1940) Vol. 1, Sect. 30-36, pp. 415-427 17

IN THE

Supreme Court of the United States

October Term, 1957

No. 348

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES, S. A., ETC.,
Petitioner

v.

WILLIAM P. ROGERS, Attorney General of the United States, as Successor to the Alien Property Custodian, and IVY BAKER PRIEST, Treasurer of the United States,
Respondents

PETITIONER'S REPLY BRIEF

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

STATEMENT OF THE ISSUES PRESENTED BY RESPONDENTS' BRIEF

The basic issue in this case was described by this Court when it invited counsel to discuss the power of the district court to dismiss, and the propriety of its dismissal under Rule 37(b)(2) F.R.Civ.P.[1] Respondents have chosen to subordinate these questions to a discussion of the propriety of the order of dis-

[1] In the order granting petition for certiorari, 355 U.S. 812, R. 2090.

covery. Their argument is predicated upon "factual" references which contain many inaccuracies and which are in a large part irrelevant to the issues presented in this appeal.[2]

In Point I of respondents' argument (Brief, pp. 29-37), it is contended that the district court's discovery order was valid because it was based on evidence allegedly showing a "virtual identity" between petitioner and the bank whose records it was ordered to produce. Respondents refer to conclusory statements of the district court to that effect, characterizing them as "findings of fact". In this reply brief we shall take issue with that point and show that the trial court made no findings on "control" and that its conclusions of control through "virtual identity" are contradicted by unambiguous evidence in the record.

In Point II of their argument (Brief, pp. 38-56), respondents undertake to show the absolute indispensability of the Sturzenegger records, and for that purpose—again without findings of fact—they set forth what seems to be the theory of their case on the merits, including many inaccuracies and many facts which, due to respondents' reluctance to submit

[2] It is a practical impossibility, and it would impose an unnecessary burden upon this Court, for petitioner to join issue separately with each statement with which it cannot agree. A typical example is the repeated charges that petitioner "suppressed" its own records (Resp. Brief, pp. 12-13). In its reply brief on petition for certiorari in No. 500, October Term, 1955, petitioner set forth its answers to this accusation (pp. 9-10), and will not repeat them here. Except for the purpose of prejudicing petitioner in the eyes of the Court, it is difficult to see why respondents persist to mention this matter. Petitioner's good faith is not in issue in this case. Indeed, its good faith has been expressly endorsed by the lower courts.

to trial, have never been passed upon by a court. We shall point out herein the obvious fact that respondents are in no position to make such a claim.

In Point III of their brief (pp. 56-73), respondents assert that Swiss law was used as an excuse for non-compliance with the discovery order, and that the trial court was correct in disregarding it. On the contrary, Swiss law has not been offered as an excuse for non-production; indeed, full discovery is possible under Swiss procedures.

Only in Point IV of their brief (pp. 73-84), do respondents address themselves to the power of the district court to dismiss and to the propriety of its order denying jurisdiction over the merits of petitioner's complaint. It is interesting to note that the district court relied upon Rules 37 and 41, F.R.Civ.P., as well as "inherent power"; that the Court of Appeals relied only on Rule 41 and "inherent power"; and that respondents rely upon Rule 37 and "inherent power". Petitioner submits that all three sources call for the same test, and that the fatal deficiency in the application of any one source to the facts of this case is likewise the fatal deficiency of all three.

Throughout this litigation, a strange attitude has persisted on the part of respondents:

Pretending to want and need the Sturzenegger bank records, respondents have nevertheless refused to co-operate with petitioner in its efforts to bring about their complete discovery. Implying that they are without any means of knowledge, respondents declined to inspect what petitioner had tendered as substantial discovery. And asserting that they would be greatly

disadvantaged by the lack of full discovery, respondents were unwilling to participate in a plan for examination of the remaining bank files which would at least have identified any relevant record and laid a proper foundation for additional inspection efforts, if needed, or, indeed, possibly for inferences adverse to petitioner who, as indicated by the courts in previous cases dealing with the Trading with the Enemy Act, has the burden of proof.[3]

Respondents' attitude cannot be interpreted otherwise than as a means to avoid a trial on the merits. It is corroborative to recall that, in 1949, respondents attempted to have petitioner's complaint dismissed without trial because, due to illness, Dr. Sturzenegger was compelled to postpone his re-appearance in this country at the taking of his deposition, R. 346-56. Their unfounded and disproved charges at that time reflected a demeanor similar to the instant one where respondents now would evade trial on the specious ground that unidentified Sturzenegger records *might* not be available to prepare their defense.[4] On both

---

[3] *Von Zedtwitz* v. *Sutherland* (1928) 58 App. D.C. 153, 26 F. 2d 525; *Sturchler* v. *Hicks* (D.C. N.Y. 1926) 17 F. 2d 321; *Feller* v. *McGrath* (D.C. Pa. 1952) 106 F. Supp. 147, affirmed *sub. nom. Feller* v. *Brownell*, 201 F. 2d 670; *Beck* v. *Clark* (D.C. Conn. 1945) 88 F. Supp. 565, affirmed *sub nom. Beck* v. *McGrath*, 2d Cir., (1950) 182 F. 2d 315.

[4] Respondents similarly attempt to avoid judicial scrutiny on the international level. A recent request of the Swiss Government for arbitration under the express terms of a treaty was declined with the statement that return or non-return of petitioner's property was a purely domestic American matter. (See American Journal of International Law (1957), Vol. 51, No. 3, p. 517) and still more recently, at the time when respondents were maintaining before this Court that denial of jurisdiction over petitioner's complaint was proper, they also rejected jurisdiction of the Inter-

occasions the effort has been made in order to foreclose judicial inquiry into the validity of the capture or summary seizure of property claimed by a neutral—property for which the United States Government has paid no compensation.

I.

THE DISCOVERY ORDER BELOW IS NOT SUPPORTED BY EVIDENCE OR FINDINGS EITHER OF CONTROL OR OF VIRTUAL IDENTITY OF PETITIONER AND THE SWISS BANK; MOREOVER VIRTUAL IDENTITY IS NOT THE TEST

Respondents do not—and indeed they cannot—argue that, *in fact*, petitioner has power or control over the Sturzenegger records. They nevertheless affirmatively undertake to support the validity of the discovery order on the ground that "control" (though not actual power) over the Sturzenegger records was confirmed by evidence showing a "virtual identity" between petitioner and the bank (Resp. Brief, p. 29). By doing this, respondents themselves have put in issue the method by which the district court proceeded to a determination in this case.

The district court has made no findings of fact on control. Its conclusions to that effect are unfounded.

It is stated on page 30 of respondents' brief that "In the *findings* on control, the district court found an intimacy verging on identity between petitioner and the Sturzenegger firm, whose records petitioner was ordered to produce. This virtual identity, of course, supports the order of discovery." (Emphasis ours)

---

national Court of Justice for protective measures during the pendency of a complaint filed there by the Government of Switzerland. *The Interhandel Case*, I.C.J. Reports 1957, p. 105.

And, on the same page: "The *findings* of control and identity are supported by a wealth of evidence on the ties between petitioner and the Sturzenegger firm . . . Separate *findings* on each of these factors were made by the district court." (Emphasis ours) Respondents then set forth a number of factual allegations not even mentioned in the trial court's opinion (Resp. Brief, pp. 31 to 37).

Petitioner challenges both respondents' method of trying to bolster the district court's conclusions and the substance of these allegations of "control" and "virtual identity".[5]

The district court did not make any findings of fact on control. The portion of its opinion referred to by respondents as "findings"[6] is a partial restatement of facts gathered from the pretrial record concerning the history, ownership and organization of petitioner and the Sturzenegger bank, and describing the terms of a written contract by which petitioner had a minority capital investment—involving no participation in management affairs, R. 1813, 1820, 1822, 1823—in the Sturzenegger partnership.

Respondents' theory of control through "virtual identity"[7] is based on two *conclusions* of the trial

---

[5] Respondents incorrectly conclude that "Petitioner has abandoned earlier attacks on the regularity of the proceedings and the form of the findings." (Resp. Brief, p. 30, fn. 12).

[6] R. 611-13, Resp. Brief, p. 30.

[7] Moreover "virtual identity" resolves nothing in this case. There may be virtual identity between the governed and the one who governs, but that does not mean that the former could control the latter. If the evidence in this case, such as it is, should prove that the Sturzenegger bank controls petitioner, which is not admitted, there is nothing to establish the converse.

court unrelated to any findings of fact in the record. One is that the trial court stated, with no evidence to support it, that a contract between petitioner and the Sturzenegger partnership, whereby petitioner was precluded from examination of the bank's business records, was not intended to apply in the litigation at bar, R. 613.[8] Secondly, the trial court concluded—again without reference to the record, to findings of fact or to reasonable inferences based on proved facts—that "Through the interlocked web of corporate organization, management, and finance there runs the thread of a fundamental identity of individuals in the pattern of control [for purposes of discovery]", R. 615.

We submit that these portions of the district court's opinion are *not* "findings of fact". They represent mere conclusions, and furthermore, they are not supported in the record.[9] But even if they be considered "findings", they are improper for the following reasons:

(a) The district court's conclusions were not arrived at after a full examination of all the available evidence on record. This defect is shown very clearly by their form and by the reservations and contradictions which characterized the proceedings in the district court on the issue of "control", and, later, on the propriety of dismissal.

---

[8] See footnote, p. 3a, Appendix to this reply brief, *infra*.

[9] Petitioner discussed this situation in minute detail in its petition for rehearing *in banc*, filed in the Court of Appeals after the opinion of June 30, 1955 in No. 12,140. Rather than repeat the argument here, petitioner attaches it hereto as an appendix to this reply brief.

In 1949, before formulating its discovery order, the district court avoided petitioner's objections that it did not have control over the Sturzenegger records with the following remarks:

> "Of course, if you have a doubt about whether they have control or not, one quick way to resolve it is to order them to do it, and if they do not do it and make a good effort, acquit them." (R. 42)
>
> "* * * I have studied this matter a long time; I have studied your partnership agreement, I know what you are talking about; *you might be debarred from getting [the Sturzenegger records] out of the partnership agreement, but you might get it out of friendship.*" (R. 74) (Emphasis ours)

Petitioner did "make a good effort" to comply with the tentative discovery order and—in the court's opinion—it failed. Almost two years were spent in an investigation and consideration by Special Master William J. Hughes of respondents' charges that the effort had not been "good", and that petitioner was in bad faith (R. 468, 521). When petitioner emerged fully cleared, however, the district court did not "acquit" it. Although no new evidence was introduced on the issues of "control" and power, the district court formulated the conclusions upon which respondents now rely, and dismissed petitioner's complaint. The statement in the district court's opinion that since the tentative ruling of control "other facts bearing upon the question have been introduced into the record", R. 611, is not correct. The new evidence before the court concerned and conclusively established petitioner's *bona fide* efforts to make discovery (See Appendix to this reply brief).

Why then did the district court suddenly abandon its initial doubts as to control other than "through friendship"? Petitioner asked it to write findings of fact to clarify its position, but the district court refused, indicating that if the appellate court desired specific findings to support the conclusions of "control" and "control through virtual identity", it could remand the case for that purpose, R. 147, 107.

(b) The conclusions of the district court on "control" and control through "virtual identity" are contrary to the facts in the record, (see Appendix to this reply brief) and they represent "very exceptional error" in the terms of *Comstock* v. *Group of Institutional Investors*, (1948) 335 U.S. 211.[10] They are disproved by the express terms of a contract, R. 1815 and *infra*, fn. 22 p. 19, and are quite clearly contradicted by the fact that petitioner was able to tender substantial discovery only after long and costly efforts.

---

[10] *Comstock* v. *Group of Institutional Investors*, (1948) 335 U.S. 211, and *Graver* v. *Linde*, (1949) 336 U.S. 271, do not support respondents' position. In both cases there had been a full hearing on the issues resulting in findings of fact. Furthermore, the district court in the case at bar disregarded clear evidence on record and reached conclusions which were clearly erroneous. Neither the so-called "two-court rule" nor respondents' characterization of these conclusions as "findings" can give them conclusive effect; cf. *United States* v. *U. S. Gypsum Co.*, (1948) 333 U.S. 364, 395; *Galena Oaks Corp.* v. *Scofield*, (5th Cir. 1954) 218 F. 2d 217; *Orvis* v. *Higgins*, (2d Cir., 1950), 180 F. 2d 537, 538, cert. den. 340 U.S. 810. In *Baumgartner* v. *United States*, (1944) 322 U.S. 665, 670-71, Mr. Justice Frankfurter pointed out that "The conclusiveness of a 'finding of fact' depends on the nature of the materials on which the finding is based * * * Finding so-called ultimate 'facts' more clearly implies the application of standards of law. And so the 'finding of fact' even if made by two courts may go beyond the determination that should not be set aside here. Though labeled 'finding of fact' it may involve the very basis on which judgment of fallible evidence is to be made."

The manner in which the district court's conclusions of "control" and "identity" were arrived at, and the manner in which respondents seek to inject them into this review as "findings of fact", are typical of the treatment received by petitioner throughout this case. The district court may have been justified, in the interest of speed,[11] to predicate its tentative discovery order on a *prima facie* conclusion of control even though serious doubts were apparent as to whether petitioner really had power over the Sturzenegger records. However, these same general conclusions are clearly insufficient now that the question is whether or not petitioner should lose its cause of action as a penalty for inability to make discovery. Such a dismissal operates as an absolute denial of jurisdiction;[12] it cannot be based on guesswork unrelated to specific facts and reasonable inferences. Even where a complaint is dismissed *on the merits* by summary judgment, the court must read the facts in the light most favorable to the plaintiff, *Dulansky* v. *Iowa-Illinois G. & E. Co.* (C.A. 8, 1951), 191 F. 2d 881; *Peckham* v. *Ronrico Corp.* (C.A. 1st, 1948), 171 F. 2d 653, 657. In the case at bar, where dismissal is with prejudice but *not* on the merits, the same standards should *a fortiori* be observed. The district court failed to do so not only with respect to the issues of "control" and "identity", but also with respect to (1) the nature of the Sturzenegger records, (2) the alleged

---

[11] Respondents state, on page 8 of their brief, that the discovery motions "pended for over five months". The district court had the matter under advisement for that length of time, but the brief hearings were concluded in a much shorter time.

[12] See *Hyam* v. *American Export Lines, Inc.* (2d Cir. 1954), 213 F. 2d 221 and *Washington-Southern Nav. Co.* v. *Baltimore & P.S.B. Co.*, (1924) 263 U.S. 629, 635.

impossibility of obtaining full information as to their nature, and (3) the "wilfulness" of petitioner's failure to comply with the discovery order.

In a case decided since the granting of our petition for certiorari, the Court of Appeals for the District of Columbia Circuit recognized this need for strict standards of procedural due process when it remanded an alien property case, dismissed below for failure to make discovery, and requested the district court to make *specific* findings of fact on the materiality of the information sought, on possession and control, and on refusal to obey the discovery order, if any such findings could be made. *Von der Heydt* v. *Rogers,* 1958, —U.S. App. D. C. —, 251 F.2d 17. In his concurring opinion, *ibid,* page 18, Judge Burger, in pointing to the need for specific findings of fact, although the district court in its order had made "conclusory" recitals which it characterized as "findings", referred (fn. 7) to the note appended to this Court's grant of certiorari at bar. It therefore appears that, *today,* the Court of Appeals—or, at least, another division of that Court[13]—might not have upheld the ruling of the district court in the case at bar without precise findings of fact to support its conclusions on the issues upon which hinge the legality of the dismissal. *Cf.* also, Judge Weinfeld *In re Harry J. Reicher,* — F. Supp. —, D.C. S.D. N.Y., decided February 25, 1958.

---

[13] Chief Judge Edgerton and Circuit Judges Bastian and Burger sat in the *Von der Heydt* case.

II.

RESPONDENTS' "INDISPENSABILITY" ARGUMENT IS A FIGMENT; TRIAL ON THE MERITS WILL NOT PREJUDICE THEM

Respondents rely on the premise that trial of the issues at bar will place them at a disadvantage unless petitioner brings every record of the Sturzenegger bank into court (Resp. Brief, p. 38). At this juncture of the case that assumption is not justified.

1. Respondents' argument ignores the existence of available data

Point II in respondents' brief mentions a myriad of alleged facts, implies that the Sturzenegger books and documents would provide respondents with the evidence to prove such allegations, and undertakes to paint a picture of extreme disadvantage to respondents if the bank records are not made available.[14]

Much in this chapter in respondents' brief is obviously designed to discuss the case on the merits in a situation where there has been no trial and, indeed, no adequate findings at the pretrial stage.

---

[14] Respondents do not have the burden of proof in alien property cases (see fn. 3, p. 4, *ante*). Momentarily recognizing this, but as suddenly ignoring it, respondents state on page 44 of their brief:

> "It is plain that petitioner cannot prove its title without the Sturzenegger records and it follows, we submit, that the Custodian cannot be required to disprove that title without those same records."

If the Sturzenegger records were not available, the problem concerning the Custodian would never arise since the petitioner has the burden to prove its title to the vested property and if it, too, does not have the Sturzenegger records, according to respondents it would fail to make out a *prima facie* case at the trial and its suit would be subject to dismissal at the conclusion of its case in chief.

Petitioner contests the accuracy of many of the statements made by respondents, but as pointed out at the beginning of this reply brief, it is unnecessary and would unduly burden the Court to take issue with respondents' allegations of fact at this stage of the proceedings.

Instead, petitioner submits that, with all the material which is presently available to respondents, they are neither justified in asserting, nor in a position to assert, that they have been deprived of information decisive in the determination of the issues.

Before even reaching the matter of the bank's records, respondents have had available (1) the depositions of Messrs. Rudolf Euler and Alfred Merton concerning the early history of the Sturzenegger banks, of petitioner, and of the alleged German co-conspirators, R. 1826-1918; (2) over 23,000 relevant documents hand picked by respondents and other Government agents in this country, in Germany and in other areas formerly occupied by the Germans, R. 26, 28;[15] the deposition of Dr. Hans Sturzenegger, the head of the Sturzenegger bank, (encompassing over 6,000 pages of transcript) as to transactions concerning both petitioner and the bank, unimpeded by limitations imposed under Swiss law, R. 342, 356; and over 40,000 records of petitioner and its subsidiary, Osmon, A.G., R. 609.[16]

---

[15] Undoubtedly these 23,000 records are a "selection" representing only a very small fraction of the evidentiary material (including the records of I.G. Farben and of other German personalities connected therewith) which was assembled by post-war investigators and made available to respondents for use in the preparation of their defenses of "enemy taint" and "cloaking".

[16] Respondents made over 70,000 microfilms of petitioner's records.

While conceding that several hundred thousand Sturzenegger bank papers and the corresponding entries in the Sturzenegger books of account have been tendered them for inspection (Brief, p. 38),[17] respondents proceed to build their argument as if not a single one of these papers was available to them. It is true that respondents have not seen these documents, but that is due to their own choosing, obviously so that they will be able to argue what they require in the way of evidence, rather than to deprive themselves of such an argument either by finding what they claim to be looking for or finding refutation of their allegations.

With no basis whatever, respondents assert on page 47 of their brief that "There is good reason, on the facts, to suspect that the Sturzenegger records contain not one but many secreted papers". This statement, as well as many others made by respondents, read in the light of their refusal to examine the bank's records which are available to them, reflects not only a fanciful and capricious attitude on their part, but, indeed, a position which borders on lack of forthrightness. To claim absolute need for the bank's records and consequent fatal disadvantage, in the face of the

---

[17] Transactions of and among petitioner, the Sturzenegger bank and I.G. Farben, as they are reflected in the files and books of the bank, have been made available, R. 668-9, 1929-32, 1946-48, 2056. It is in this area that much complaint is voiced by respondents in the second point of their brief.

On pages 48-49 of respondents' brief, emphasis is put upon the "consortia and secretariats", and the argument is made that the absence of these records leaves a void in respondents' discovery. Respondents fail to mention to the Court, however, that many of the files relating to consortia and secretariats were tendered to respondents; R. 669-70, 1929-32, 1946-48. Indeed, in order to dramatize the availability of such records, one of these files was physically tendered to respondents' counsel in open hearing in the District Court in November 1952, and the tender was refused, R. 116.

availability of so many of them, seems to be some kind of a pretext which purposely ignores realities.

Over and over again in this chapter of respondents' brief the protest is made that the Sturzenegger books must be examined. Petitioner repeats—and respondents concede on page 38 of their brief—that the books have been tendered for inspection to the extent that the waivers and consents permit examination.[18] At this stage, not even respondents are able convincingly to assert that such inspection will not be adequate.

2. Full investigation of the Sturzenegger records is possible

In addition to what petitioner has already tendered as substantial discovery, the remainder—if any—of the relevant Sturzenegger records, as pointed out in petitioner's main brief (pp. 40-42), may be identified for use at trial and may, according to the Swiss Government, be obtained by letters rogatory if so desired. Any speculation as to what the Sturzenegger records contain is thus utterly unnecessary.

Respondents' objections to this offer of full discovery in accordance with the laws of the *situs* of the Sturzenegger records are patently specious.

In the first place, respondents complain that inspection of the Sturzenegger records as tendered would constitute "partial" or selective discovery and is thus *a priori* unacceptable (Resp. Brief, p. 38). If by "selective discovery" it is implied that petitioner has withheld or might withhold evidence damaging to it and helpful to respondents, it may be pointed out that petitioner, whose good faith has been amply con-

[18] R. 2012-2013.

firmed in this case, is in no position to decide which Sturzenegger records should be exhibited and which must be retained for lack of waivers; nor could petitioner interfere with the inquiries of a neutral investigator appointed with respondents' approval.[19]

Respondents further argue that, under petitioner's supplemental discovery plan, the independent investigator would usurp the functions of the trial court (Resp. Brief, p. 41). That is clearly no more so than in *Service Liquor Distributors, Inc.* v. *Calvert Distillers Corp.*, (D.C. N.Y. 1955), 16 F.R.D. 513, or in any case where records to be produced are generally described by subject matter and their selection is by necessity left to the party from whom discovery is demanded. Such party resolves both the question of relevancy and the problem of whether the document is called for.

In this case, the independent investigator would not have to substitute his judgment for that of the court to determine which papers are relevant and which are not. The trial court can define relevancy in concrete and unambiguous terms either by reference to particular individuals and companies, or by reference to general subject-matters. That such criteria would be entirely adequate has been admitted by respondents themselves when, in commenting upon a list of 124 persons whose records petitioner could allegedly have produced they said:

> "We dare say for all practical purposes these documents amount to the total of all Sturzenegger papers." (MS. R. 4865—unprinted record.) (See, also, our Brief, p. 19.)

---

[19] Nor is there any reason to fear that the Swiss Government or the Sturzenegger bank did or will withhold any material damaging to petitioner.

3. The trial court has power to protect respondents by inferences drawn in the course of trial on the merits.

If, contrary to all indications, there should remain a residue of Sturzenegger records, identified as to substance but physically unavailable for trial, respondents would have full opportunity to protect themselves in the course of a trial on the merits, since the district court would then[20] have ample power to draw *reasonable* inferences based on the absence of *specific* information.[21] The fact that, as indicated above, the burden of proving lack of enemy taint and title to the vested property is imposed upon the plaintiff-petitioner, gives respondents additional assurance that the absence of specific proof will not operate to prejudice them.

---

[20] Clearly, it would be unfair and premature to attempt to draw inferences upon the absence of Sturzenegger records *before* it is known whether any records are unavailable, and if so, what their nature and impact on respondents' defense would be. The power to draw inferences reposes in the *trial* court, and presupposes an evaluation of all the evidence available. Such an evaluation has never been undertaken by the District Court. As to the modes by which inferences may be drawn by a court, cf. Wigmore on Evidence, 3d Ed. (1940) Vol. 1, §§ 30-36, pp. 415-427; cf. also *Montgomery* v. *Hutchins* (9th Cir. 1941) 118 F. 2d 661, 665; *Cold Metal Process Co.* v. *McLouth Steel Corp.* (C.A. 6, 1942), 126 F. 2d 185, 188.

[21] The proceedings reviewed on this petition also originated in an attempt to resolve the substantive issues by an inference—general rather than specific—based upon petitioner's alleged conspiracy with the Swiss Government to conceal the Sturzenegger records, R. 416, 417, 433-4. When that charge was dismissed after a thorough investigation by Special Master William J. Hughes, the inference of bad faith in petitioner's pleadings—which would admittedly have been ground for dismissal under Rule 37(b) F.R.Civ.P.—equally had to fall. The only time when inferences may now be drawn—in the absence of a showing of bad faith on the part of petitioner—is at trial and with reference to the specific issues and evidence before the court.

At this stage and on this record, the courts are not in a position to evaluate whether any relevant Sturzenegger records are missing and, if so, what they represent. Resolving probabilities, at best, involves a large measure of speculation and uncertainty. Real evaluation could occur, possibly, when the available records are inspected, or more likely, only when their absence reflects adversely upon a party's position during the actual trial. Neither event has yet happened. As a present alternative, respondents maintain that the courts must blindly enforce production at 100 per cent with consequent imposition upon an innocent party-plaintiff of the penalty of dismissal for failure. That is what has been done by the lower courts in this case. No one would deny that such an alternative is harsh and extreme.

The choice should not be difficult. Every possibility should be exhausted before an innocent party is deprived of his day in court.

III.

SWISS LAW HAS NOT BEEN OFFERED AS AN EXCUSE FOR NONPRODUCTION;* INDEED, FULL DISCOVERY IS POSSIBLE UNDER SWISS PROCEDURES

1. Effect and place of Swiss Law in the case at bar

Respondents mistakenly argue that Swiss law appears in this case as an "excuse" for non-compliance (Resp. Brief, p. 56).

In the first place, and quite apart from the laws of Switzerland as the *situs* of the Sturzenegger records, petitioner's connection with the banking partnership

* The British Prize Cases, cited and relied upon by respondents in their brief (pp. 68-70), are discussed and distinguished in this chapter. (pp. 21-24).

never gave it the *right* or *power* to inspect or to demand production of the Sturzenegger files.[22]

Secondly, developments in this case have shown that Swiss law and the order of the Federal Attorney do not prohibit inspection of the Sturzenegger records. They prohibit disclosure of information contained in *any* banking file without the consent of the customers to whom it relates, R. 541, 547 (Concl. No. 10), but they specifically permit:

(a) disclosure of records if the bank customers mentioned therein give their consent; on that basis, petitioner has been able to obtain more than 200,000 Sturzenegger records which it has tendered to respondents as substantial discovery, R. 2012, 2052, 2056;

(b) full investigation of the remaining files by an independent person authorized to identify any relevant records he may find, R. 1951-55;

(c) physical disclosure of the remaining relevant records by additional consents or by letters rogatory, R. 1955.

Clearly, Swiss law does not, as suggested by respondents (Resp. Brief, p. 67), put petitioner—who

[22] This is conclusively shown by the express terms of a contract, terminated prior to the discovery order by unilateral action of the Sturzenegger partners, whereby petitioner had a minority investment in the Sturzenegger firm but was denied access to the bank's files except for limited purposes through an appointed representative who was not even entitled to disclose and *a fortiori* produce the bank's records, R. 1815. The trial court expressed the opinion (*supra*, p. 7) that this contract might not have been intended to cover the situation at bar, R. 613. There is no support in the record for such a view, and the developments in this case have expressly disproved it.

has the burden of proving its non-enemy nature—in a "privileged position". Nor can it, by demanding compliance with universally binding rules concerning the method by which discovery may be obtained, permit petitioner to conceal any damaging transactions. The effect of these requirements of Swiss law on court litigation is basically the same as the limitations which a court may in its discretion impose upon pretrial discovery or interrogatories under Rules 30(b) and 34, F.R.Civ.P., Cf. our Brief, p. 37.

2. Swiss Law in the case at bar is not a procedural rule of privilege; it is a fact to be considered in determining absence or presence of control

Petitioner has no quarrel with the general rule that a foreign privilege may not be claimed in American courts (Resp. Brief, pp. 65-67), and that even foreign sovereigns must submit to the procedural requirements of the *forum*; that laws based on public policy can have no extra-territorial effect, (*ibid*) or that under British prize rules the presumptions of contraband through "continuous voyage" or "infection" may be allowed to stand even though documents, the nature of which claimant cannot disclose under foreign secrecy laws, are alleged to contain rebuttal evidence.[23]

The issue at bar, however, is of an entirely different nature. Neither petitioner, nor the Sturzenegger bank, nor indeed the alleged "co-conspirators" and other customers who have waived their secrecy rights, claim any privilege.

Rule 34, F.R.Civ.P. requires a showing of control before records not in the possession or custody of a

---

[23] Cf. p. 22, *infra*; these presumptions are discussed in Colombos, *Law of Prize*, 2d Ed. 1940, pp. 182, 196-199.

party may be ordered produced (our Brief, p. 36). "Control" is a fact, which in turn *may* (but in this case does *not*) hinge upon the existence of a legally enforceable right to dispose of the particular records. If the law of a foreign country where the records are located—*and which therefore has exclusive physical power over them*—effectively abolishes such right, it is as much a *fact* as a fire which may have destroyed the same records. In such a case, the American court is not required to *apply* or *enforce* the foreign law. It is merely called upon to consider it in determining the presence or absence of "control". A refusal to do so is error not because of any positive rule of international law, but under substantive provisions of municipal law—here Rule 34, F.R.Civ.P. It would, in a discovery situation, be just as inequitable as the refusal to consider in a contract case the factual impact of a foreign government prohibition where a promise could only be performed in the country which imposes the prohibition, Cf. *Holzer* v. *Deutsche Reichsbahn-Gesellschaft* (N.Y. C.A. 1938), 277 N.Y. 474, 14 N.E. 2d 798.

On page 69 of their brief respondents list a number of British prize cases in support of the propriety of dismissal without adjudication on the merits where certain evidence is not available under foreign secrecy rules.

In the first place, the British prize cases are basically distinguishable from the situation at bar because the records there unavailable were in the possession of the claimants in prize. Under British discovery law, applicable in Prize courts, *The Counsul Corfitzon* (1917) A.C. 550, records which, as here, are

neither in the possession nor in the actual power of a party, cannot be ordered produced for inspection (Cf. British cases cited in our brief on p. 36). Furthermore, what the Prize courts demanded—but claimants there were unable to produce—was information identifying the records, and not the records themselves, for that is the meaning of "discovery" under British law, Halsbury's Laws of England, 3d Ed. (1955), Vol. 12, p. 2. In the case at bar, Swiss law permits identification of every Sturzenegger record; clearly the Prize courts would have been satisfied. Cf. *The Kronprins Gustav Adolf*, 6 LL.P.C. 244.

Secondly, respondents err in characterizing the Prize court rulings as dismissals without adjudication of the merits. Unlike the case at bar,[24] the claims there were denied *on the merits* due to the absence of proof deemed necessary to rebut a number of reasonable inferences which in turn are based on a *full* evaluation of the evidence on record.[25] Among these inferences are various presumptions of Prize law—such as the doctrines of "continuous voyage" and of "infection"[26]—justified by the wartime need for

[24] Dismissal at bar was with prejudice but admittedly not on the merits.

[25] In some cases (e.g. *The Consul Corfitzon* (1917) A.C. 550; *The Antilla*, (1918) 7 LL.P.C. 401) the only evidence on record appeared to be the "captor's evidence", i.e. the ship's papers; since no evidence was available to rebut the presumption of "continous voyage", *infra*, fn. 26, dismissal could be ordered *on the merits* as soon as it became certain that discovery could not be made.

[26] Cf. Baty, "Continuous Voyage as Applied to Blockade and Contraband", Transactions of Grotius Society, Vol. 20 (1935), p. 140; *The Maria* (No. 3) (1805) 5 C.Rob. 365; *The Bermuda*, (1866), 3 Wall. 514; Colombos, *supra*, p. 196; these presumptions of prize law are rebuttable; they merely reverse the burden of

speedy condemnation proceedings[27], though of doubtful validity under our due process standards, Deak & Jessup, *Doctrine of Continuous Voyage*, 7 Tulane L. Rev. 388 (1933). The fact that dismissal operated on the merits is stated clearly by the Privy Council reviewing prize cases:

> "Their Lordships therefore conclude that, *looking at all the known facts from the common sense point of view*, there were circumstances of suspicion calling for further inquiry, and amply *sufficient to justify the seizure*, so that the only remaining question on this part of the case is whether appellants are right in their contention that these facts, or some of them, ought to have been disregarded altogether, because their *existence* was not due to any action or omission for which the appellants could be held responsible." (Emphasis ours) *The Baron Stjernblad* (1918), A.C. 173, 178, 179.

> "Their Lordships cannot hold a captor's *evidence* is not to *prove* whatever it is capable of proving merely because the claimant is not permitted by the laws of his country to produce the evidence appropriate to rebut it." (Emphasis ours) *The Kronprinzessan Victoria* (1919), A.C. 261, 268.

It is true that Prize courts have held that they could "disallow a claim for the release of cargo when the claimants *wilfully withhold* material documents in their possession or control, or other evidence which it

---

proof, *The Kronprinzessan Margareta* (1921), 1 A.C. 486. (also 2 P. Cas. 409 (1916-17), and 3 P. Cas. 138 (1917-18), where it is clearly shown that the case was tried on its merits).

[27] "After six months have elapsed without the interposition of a claim, the Court is entitled to proceed to the condemnation . . .", Colombos, Law of Prize, 2d Ed., 1940, pp. 312-313, *The Antilla* (1918) 7 LL.P.C. 401.

is within their power to produce", Colombos, *supra*, at page 185 (emphasis ours). Cf. also, *The Bravo*, P.C. (Oct. 17, 1917), Official Trial Notes, by Sir Samuel Evans. But they cannot, in the absence of reasonable inferences drawn from a full trial of the facts before them, dismiss only because the claimants are unable, owing to circumstances beyond their control, to furnish the required evidence; Colombos, *ibid*, and at page 88; *The Anatoli*, (France) J.O. August 23, 1917, 6741. If, after full examination of the facts and ultimate issues, no adverse inferences or presumptions could be maintained, claimants in prize have indeed been allowed to recover interest on the value of wrongfully detained cargo, even though the Swedish claimant's case was founded largely on *ex parte* affidavits. *The Kronprins Gustav Adolf*, 6 LL.P.C. 244.

Denial of jurisdiction here complained of was founded neither on reasonable inferences, nor, indeed, in the words of the Prize court in *The Baron Stjernblad, supra*, on an evaluation of "all the known facts" to determine whether they were "sufficient to justify the seizure". Dismissal at bar finds no support in Prize law, nor in the British ruling in the case of *Re Von Kantzow's Patent* (1944), Ch.D. 318, where dismissal was *on the merits* after a Swedish patentee failed to introduce the needed proof of revenue losses, as required under British law to extend the duration of patent rights during the war.

In the case at bar, Swiss law merely confirms the absence of control by petitioner over the Sturzenegger records. But even so, Swiss law allows production subject to certain conditions which, as pointed out

above, can be met with respondents' cooperation.[28] The purpose of the district court's discovery order was to make available certain information before trial. If, as here, that result can be accomplished without demanding that petitioner violate foreign law, the trial court not only has ample power under Rule 30(b) to order measures which would avoid such a violation, but it is *required* to do so. *Skiriotes* v. *Florida,* (1941) 313 U.S. 69, 73; *Steele* v. *Bulova Watch Co., Inc.,* (1952) 344 U.S. 280; *Cole* v. *Cunningham,* (1890) 133 U.S. 107, 117-119; *Phelps* v. *McDonald,* (1879) 99 U.S. 298, 307, 308; *Massie* v. *Watts,* 6 Cranch. 148; *The Salton Sea Cases,* 172 F. 792; *S.E.C.* v. *Minas de Artemisa, S.A.,* (1945) 150 F.2d 215. Any other view would ask our courts to pass judgment on the political wisdom of foreign laws, as was *unnecessarily* done by the district court in this case.

IV.

THE DISMISSAL ORDER CANNOT BE SUPPORTED BY ANY OF THE SOURCES OF POWER RELIED UPON

Under the title "The District Court had the Power to Order Dismissal" (Resp. Brief, p. 73) respondents suggest that the constitutional limitations described in *Hovey* v. *Elliott,* (1897) 167 U.S. 409, and in *Hammond Packing Co.* v. *Arkansas,* (1909) 212 U.S. 322, upon which petitioner relies, did not affect the *power* of courts to dismiss, but merely the *propriety* of such action. On page 77 of their brief, respondents cite *Hammond Packing Co.* v. *Arkansas* as authority for

---

[28] Twice, petitioner sought respondents' cooperation. Once, by specific motion, R. 598, which the district court denied; and, again, as part of the "independent investigator" plan, R. 1951-55, which the lower courts refused to adopt.

the continued existence of such an *unlimited general* power to dismiss and on page 78 they conclude that the rulings at bar "square" with the theory of the *Hammond* case.

Hovey v. *Elliott, supra,* and *Hammond Packing Co.* v. *Arkansas, supra,* clearly regulate and limit the *power* of a court to dismiss without trial. In the *Hammond* case this Court expressly negated the *power* to dismiss except when ". . . . any reasonable showing of an inability to comply would have satisfied the requirements both of the statute and the order . . ." (212 U.S., p. 347) and described the *power* of the Arkansas court as follows: ". . . the generating source of the *power* was the right to create a presumption flowing from the failure to produce" (*ibid,* p. 351, emphasis ours).

It is obvious that the rulings at bar do not "square" with the *Hovey* and *Hammond* cases, *supra.* The district court at bar was not satisfied by "any reasonable showing of inability to comply", nor did it use dismissal "as a means of *compelling* the production of evidence",[20] since in the court's own view petitioner was "unable" to produce and any compulsion would have been of no avail.

Respondents admit on page 78 of their brief that "Had the dismissal in the instant case been *intended as* punishment, it would have been beyond the power of the court, because it would be 'unjust', . . . or contrary to due process". (Resp. Brief, p. 78, emphasis ours). But, respondents argue, dismissal at bar was

---

[20] Compare this characterization of the *Hammond* rationale appearing in the Committee note to Rule 37, 28 U.S.C. (1952 ed.) foll. Sec. 2072; also resp. brief, p. 79.

not *intended* as a punishment; therefore it was neither unjust nor contrary to due process. The fallacy of respondents' position is apparent. Regardless of what the district court intended to accomplish, dismissal at bar in fact resulted in a penalty. Clearly dismissal was not a means to "*compel*" obedience, since petitioner was unable to comply. Nor was it a dismissal on the merits by virtue of a presumption of bad faith (Cf. our brief, pp. 31, 34). It could only be construed as a *punishment*, prohibited by *Hovey* v. *Elliott*, *supra*. Cf. also *Duell* v. *Duell*, (C.A. D.C. 1949), 85 U.S. App. D.C. 78, 83, 178 F. 2d 683, and *Cummings* v. *The State of Missouri*, (1866) 4 Wall. 277.

Clearly, as argued in our main brief, dismissal under Rule 37(b) must be predicated upon a showing of wilful failure to make discovery.

Heikkinen v. *United States*, 355 U.S. —, (No. 89, dec. Jan. 6, 1958) 2 L.Ed. 2d. 264, *United States* v. *Murdock*, (1933) 290 U.S. 389, and *Sinclair* v. *United States*, (1929) 279 U.S. 263, 299, are cited in respondents' brief (p. 75) for the proposition that the element of "wilfulness" was either not required to constitute a "refusal" or was met where disobedience was "without justifiable excuse" (in respondents' opinion, Swiss law was the "excuse" for non-production). The cases do not support the position. In the first place, the *Hovey* and *Hammond* rulings and the legislative history of Rule 37(b), as well as the views of other courts, our Brief, p. 25), make it abundantly clear that wilfulness is an element of refusal—and indeed must be if Rule 37(b) is to be constitutional.[30] Both in the *Murdock*

[30] It is an elementary rule of statutory construction that no ambiguity in a statute will be interpreted so as to make it contrary

and *Sinclair* cases—which dealt with criminal aspects of refusal to testify in a tax matter and at a congressional hearing, respectively—the defendants had made a *voluntary* choice not to comply. That alone would distinguish them from the case at bar. In *Murdock*, the explanation offered was the Fifth Amendment, and this Court held that, in view of it, the conviction was properly reversed. In *Sinclair*, the defense was mistake of law as to the proper scope of the congressional inquiry. This Court at that time held that "intentional violation is sufficient to constitute guilt", and that defendant's mistaken view of the law was no defense (p. 299). In the case at bar, if there was failure to comply at all, it was neither "intentional", nor, indeed, a "refusal". In *Heikkinen* v. *United States*, *supra*, this Court, citing its earlier opinion in *United States* v. *Spector*, (1952) 343 U.S. 169, held that a deportee can only be said to *wilfully fail or refuse* to depart if there exists a country willing to receive him. This parallels and fully supports the view that there can be no "refusal to obey" a discovery order unless the party from whom discovery is demanded has *in fact* the power to obtain and produce them. In *Heikkinen and Spector* the element of "wilfulness" was expressly established by statute. In this case, where due process considerations apply, it is based on the term "refusal" and flows from the constitutional limitations

---

to the Constitution, *American Communications Asso.* v. *Douds*, (1950) 339 U.S. 382, 407; *United States* v. *Congress of Industrial Organizations*, (1948) 335 U.S. 106, 120, 121; *McCullough* v. *Virginia* (1898) 172 U.S. 102. That is *a fortiori* the case for the Federal Rules of Civil Procedure, *Sibbach* v. *Wilson & Co.*, (1941) 312 U.S. 1. In view of the constitutional limitations on the power to dismiss, "control" in Rule 34 must mean "actual control", and "refusal" in Rule 37 must contain the element of wilfulness.

on the power to dismiss, *Hovey* v. *Elliott, supra*, and *Hammond Packing Co.* v. *Arkansas, supra.*

Respondents further seek to avoid the plain language of Rule 37 and the constitutional limitations described above by submitting that the trial court had other sources of power to dismiss, in particular Rule 41, F.R.Civ.P., the "inherent" power of a court of equity to dismiss in order to compel compliance with *reasonable*[31] orders, and Section 17 of the Trading with the Enemy Act, 50 U.S.C. App. 17.

The cases cited by respondents (Resp. Brief, pp. 82 and 83) in support of broad "inherent power" to dismiss indicate that even there trial courts are bound by the very same limitations found to exist under Rule 37(b); in particular, the "inherent power" to dismiss presupposes a clear showing of wilful or inexcusable refusal to comply with a reasonable order of the court. In *First Iowa Hydro Elec. Coop.* v. *Iowa-Illinois Gas and Elec. Co.*, (8th Cir. 1957) 245 F.2d 613, 628, the first case cited by respondents to exemplify the broadness of the "inherent power to dismiss", the Court of Appeals clearly said:

> "Under Rule 37(d) and Rule 41(b) of the Federal Rules of Civil Procedure as well as in the exercise of its inherent power the District Court is authorized to dismiss the action of any individual plaintiff who wilfully disobeys a *proper* order of the court . . ." (p. 628; emphasis ours)

---

[31] The district court's discovery order, which required petitioner to do what the court considered an impossibility, was obviously neither "reasonable" nor "proper".

There is no doubt that plaintiff, who in that case had deliberately walked out of the hearing room (*ibid*, p. 619), had "wilfully and without justification or excuse refused" to comply (*ibid*, pp. 615, 628). The same is true for the other cases cited by respondents, in all of which failure to comply or to prosecute was expressly found to have been wilful or totally without justification.[32]

As indicated by the Court of Appeals in *First Iowa Hydro Elec. Coop.* v. *Iowa-Illinois Gas & Elec. Co.*, *supra*, the requirement of wilfulness—which limits the power to dismiss under Rule 37 and under the "inherent power" to dismiss—applies equally to dismissals under Rule 41(b),[33] which constitutes the involuntary dismissal provision of the Federal Rules of Civil Procedure. Except for the case at bar, it

---

[32] *Zielinski* v. *United States*, (2d Cir. 1941) 120 F. 2d 792-3 (unexplained failure to prosecute for 4 years, and for an additional 2 years after dismissal); *Boling* v. *United States*, (9th Cir. 1956) 231 F. 2d 926-928 (unexplained failure to prosecute for 1 year); *Carnegie Natl. Bank* v. *City of Wolf Point*, (9th Cir. 1940) 110 F. 2d 569 (where case was remanded with instructions to dismiss *unless* appellant brought suit he had won to conclusion within a reasonable time); *Hicks* v. *Bekins Moving & Storage Co.*, (9th Cir. 1940) 115 F. 2d 406 (failure to prosecute; case had been called for assignment 16 times in 20 months); *American Lithographic Co.* v. *Werckmeister*, (1911) 221 U.S. 603 (wilful refusal to respond to subpoena, not cured by privilege against self-incrimination, which is not available to corporation); *Refior* v. *Lansing Drop Forge Co.*, (6th Cir. 1942) 124 F. 2d 440 (wilful refusal to appear and to comply with reasonable order entered by Court as a result thereof); Cf. also *National Union* v. *Arnold*, (1954) 348 U.S. 37, *infra*, p. 31.

[33] 41(b) "Involuntary Dismissal: Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. * * *"

has been the consistent practice of federal courts to construe Rules 37 and 41(b) as being *in pari materia* in instances where a party refuses to make discovery, and to dismiss only upon a showing of *wilful* disobedience or inexcusable neglect.[34] In a number of cases dismissals were reversed where it was shown that failure to comply was not wilful or imputable to one of the parties; *Jefferson* v. *Stockholders Publishing Co.* (9th Cir. 1952), 194 F.2d 281; *Duell* v. *Duell* (C.A. D.C. 1949) 85 U.S. App. D.C. 78, 83, 178 F.2d 683, 687; *Red Warrior Coal & Mining Co.* v. *Boron* (3rd Cir. 1952), 194 F.2d 578.[35]

Respondents rely on *National Union* v. *Arnold*, (1954) 348 U.S. 37, and *Jones* v. *Union Guano Co.*, (1924) 264 U.S. 171, in support of their argument that the constitutional limitations described in *Hovey* v. *Elliott* and in *Hammond Packing Co.* v. *Arkansas* do

---

[34] *Mooney* v. *Central Motor Lines, Inc.* (6th Cir. 1955), 222 F. 2d 569; *Blake* v. *DeVilbiss Co.* (6th Cir. 1941), 118 F. 2d 346; *Syracuse Broadcasting Corp.* v. *Newhouse* (Jan. 10, 1958, N.D. N.Y.), 25 F. Rules Serv. 41.b.13, Case 1, ..., F. Supp. ..... Cf. also as to dismissals under Rule 37(b): *Textile Products* v. *Formax Mfg. Corp.* (E.D. Mich. 1952), 13 F.R.D. 302; *Delphy* v. *Bernuth Lembcke Co.* (2d Cir. 1954), 217 F. 2d 301; *Cleary Bros* v. *Christie Scow Corp.* (2d Cir. 1949), 176 F. 2d 370; *V.O. Machinoimport* v. *Clark Equipment Co.* (S.D. N.Y. 1951), 12 F.R.D. 191.

[35] Also, *Producers' Releasing Corp. de Cuba* v. *P.R.C. Pictures* (2d Cir. 1949), 176 F. 2d 93; *Colonial Drive In Theatre, Inc., et al.* v. *Warner Bros. Pictures, Inc.* (Feb. 13, 1958, S.D. N.Y.), 25 F. Rules Serv. 41.b.11, Case 5; *Livingstone* v. *Hobby* (1954, E.D. Pa.), 127 F. Supp. 463; Cf. also, under Rule 37(b) F.R.Civ.P., *Haskell* v. *Philadelphia Transportation Co.*, (1956 E.D. Pa.), 19 F.R.D. 356; *Campbell* v. *Johnson* (S.D. N.Y. 1951), 101 F. Supp. 705, and, under Rule 37(d) F.R.Civ.P. *Brookdale Mill, Inc.* v. *Rowley*, (C.A. 6th, 1954) 218 F. 2d 728, *Sanib* v. *United Fruit Co.* (S.D. N.Y. (1955) 19 F.R.D. 9; *Ross* v. *True Temper Corp.* (N.D. Ohio, 1951), 11 F.R.D. 307.

not always apply to dismissals. The *Jones* case dealt only with the unquestioned legislative power of states to abolish causes of action. In *National Union* v. *Arnold, supra,* this Court held primarily that the availability of appeal in State courts was not a matter of due process. It also concluded that dismissal of the appeal in that case was not contrary to the due process standards expressed in *Hovey* v. *Elliott,* because

> (a) dismissal was a reasonable measure to prevent the attempted *wilful* flouting of a court order; and
>
> (b) appellant had had its day in court on the issues raised in the pleadings.

In the case at bar, the distinctive premises upon which this Court based its opinion in *National Union* v. *Arnold* do not exist. The alleged failure to produce certain Sturzenegger records was admittedly not wilful; dismissal was not reasonably calculated to compel obedience, but was a punishment; petitioner did not have its "day in court" on any of the issues raised in the pleadings, nor even on the subsidiary issues of control, designation and inability to comply raised under Rules 34 and 37, F.R. Civ.P.[36]

Due process limitations on the *power* to dismiss are particularly necessary in a judicial review of the

---

[36] In *Hyam* v. *American Export Lines, Inc.* (2d Cir. 1954), 213 F. 2d 221, Mr. Justice Harlan (then Circuit Judge in the Second Circuit) held that procedural rules were not to be construed as to impose conditions upon litigants that in effect amount to a "denial of jurisdiction." Cf. also *Deauville Associates, Inc.* v. *Eristavi-Tchitcherine, et al.* (5th Cir. 1949), 173 F. 2d 745, where

taking of property under the Trading with the Enemy Act, where such property may be, and in the case at bar has been, vested without even an administrative hearing on the issues upon which hinges the legality of the taking. Section 17 of the Act permits a court to ". . . make . . . such orders . . . as may be necessary . . . to enforce the provisions of this Act . . ."[37] This Court declared that the Trading with the Enemy Act was designed to permit the taking of property of enemies, but not of friendly neutrals, and to permit the latter to establish their non-enemy status and recover their property through the courts

---

denial of a motion to intervene was reversed although the movant had violated a previous court injunction:

> "A litigant may be punished for contempt by fine or imprisonmem or both . . . but the court should not prescribe, as a means by which he should purge himself of such contempt, that its doors be closed to him in defense of either his liberty or his property. . . ." (p. 746)

[37] It may be true that, as a wartime measure, the Trading with the Enemy Act may properly dispense with some of the due process limitations normally incumbent upon the taker of private property, so as to permit effective and speedy elimination of enemy control over property located in the United States. That purpose is accomplished by summary vesting under Section 5(b) of the Act, which requires no hearing and no justification except that the assets be the property of aliens. An entirely different picture is presented as to the *permanent retention* of that property after cessation of hostilities. No justification exists then for summary proceedings. Section 9 of the Act requires a *full* judicial investigation of the enemy nature of the vested assets, and there is no reason or justification for assuming that the judicial inquiry should not be conducted in the manner prescribed for the Judiciary by the Constitution. Indeed, this Court has underlined the need for *full* judicial review if the taking of property under the Trading with the Enemy Act is to be constitutional, *Stoehr* v. *Wallace*, (1921) 255 U.S. 239; *Clark* v. *Uebersee Finanz-Korp.* (1947) 332 U.S. 480.

of the United States, *Clark* v. *Uebersee Finanz-Korp., supra.* Clearly Section 17 does not empower trial courts to avoid that essential judicial function. Many years ago, this Court said in *William N. McVeigh* v. *United States*, (1871) 11 Wall. 259:

> "In our judgment the district court committed a serious error in ordering the claim and answer of the respondent to be stricken from the files. . . . The order, in effect, denied the respondent a hearing. It is *alleged* that he was in the position of an alien enemy, and hence could have no *locus standi* in that forum. If assailed there, he could defend there. The liability and the right are inseparable. A different result would be a blot upon our jurisprudence and civilization. We cannot hesitate or doubt on the subject. It would be contrary to the first principles of the social compact, and of the right administration of justice." (p. 627, Emphasis ours.)

This, we believe, is still the law.

Respectfully submitted,

ROGER J. WHITEFORD
JOHN J. WILSON
HUBERT A. SCHNEIDER
Attorneys for Petitioner
815 - 15th Street, N. W.
Washington 5, D. C.

Of Counsel:

PEIDER KONZ
WILLIAM E. ROLLOW

April, 1958

APPENDIX

*(The following is keyed to footnote 9 on page 7 of this reply brief. It is the reproduction of a portion of the petition for rehearing in banc, filed in the Court of Appeals after the decision of June 30, 1955, in No. 12140.)**

* * * * *

EITHER JUDGE LAWS' DECISION UPON PRIMARY CONTROL SHOULD BE REVERSED, OR THE CASE SHOULD BE REMANDED FOR ADEQUATE FINDINGS

Two Courts—Chief Judge Laws' and this Court—have now decided that appellant had such "control" over the Sturzenegger papers that its failure to produce them is inexcusable and it will be foreclosed from seeking to recover *its* property of the value of one hundred million dollars, although neither court has given a single reason why such "control" existed.

Two opinions of Judge Laws "touch" upon the problem. One is his opinion of June 23, 1949, (J.A. 335) in which he merely "finds a *prima facie* case of control by plaintiff is made out," (J.A. 338); and the other is his opinion of February 19, 1953 (J.A. 605) in which, after six paragraphs of "other facts bearing upon the question [which] have been introduced into the record," (J.A. 611), he states (J.A. 615): "On further consideration, the Court now definitely concludes that the Sturzenegger papers were and are in the possession, custody or control of the plaintiff * * *."

The six paragraphs to which appellant refers above are found at pages 611-613 of the Joint Appendix. There is not a single fact stated in those six paragraphs from which a conclusion of appellant's control over Sturzenegger

---

* Refereneces herein to "J.A." and a page number are the same as "R" and the page number in the printed record on certiorari in this case No. 348, October Term, 1957.

could be reasonably inferred. They may be analyzed as follows:

First paragraph: This merely states that Sturzenegger is in both companies and the dominant personality in the Bank.

Second paragraph: This merely shows that in the Sturzenegger partnership, Sturzenegger was the unlimited partner, Industriebank the limited partner and appellant a "sleeping partner." (Prior to May 27, 1949, the important thing is that appellant's interest was 18%—not 44% "until 1943".) It is true that Industriebank was the dominant stockholder in appellant, but that has nothing to do with "control" over Sturzenegger. The fact that Industriebank "forms a link," with three other companies, "in a tight chain of control," is entirely beside the point. It is *not* control over the Sturzenegger Bank or its papers.

Third paragraph: The interdependence of the four firms mentioned has nothing to do with the question of appellant's "control" over the Greutert/Sturzenegger Bank. See our main brief, pp. 23-26 and 54-56.

Fourth paragraph: In this paragraph Judge Laws states that at the time of the Swiss Compensation Office investigation, "[N]o objection was then raised that the documents of H. Sturzenegger & Cie. were not in the possession, custody or control of I. G. Chemie." The fact of the matter is that the Swiss Compensation Office did not approach the Sturzenegger papers *through* Chemie, as Judge Laws attempted to do, but acted directly *at and toward* Sturzenegger. This is alluded to again by Judge Laws in his memorandum of November 16, 1953, which this Court picked up on page 6 of its opinion.

Fifth paragraph: This paragraph merely states that appellant's investments were managed by Sturzenegger, and that the two are in close physical proximity. It then proceeds to discuss a situation "until 1940"; and returning to the present tense, refers to ownership of appellant's stock—not control over Sturzenegger.

Sixth paragraph: In this paragraph, Judge Laws arbitrarily overrides the express language of the partnership agreement.[4]

Just before expressing his "definite conclusion" (J.A. 615), Judge Laws wrote (J.A. 615): "Through the interlocked web of corporate organization, management and finance there runs the thread of a fundamental identity of individuals in the pattern of control." Appellant says respectfully yet emphatically that these are mere words and that there is not a scintilla to support the statement if

---

[4] [This footnote is omitted.] Footnote 20 on page 13 of petitioner's Reply Brief in the Court of Appeals explains this statement. That footnote reads as follows:

[20] Article 8 [R. 1815 of the record in No. 348, October Term, 1957] reads as follows:

"The partners with limited responsibility are entitled to be informed of the course of the partnership affairs. However, only the special delegates, who have to treat their knowledge as strictly confidential, are personally entitled to inspect the business books and papers of the partnership."

Regarding this Article, Judge Laws stated in his opinion of February 19, 1953 [R. 613 in No. 348]:

"Plaintiff has argued that I. G. Chemie was only a sleeping partner or investor in H. Sturzenegger & Cie., that it was only entitled to be informed of the course of the partnership affairs. Under the partnership agreement, only the special delegates, one from each partner, were personally entitled to inspect the business books and papers of the partnership, and they were required to treat their knowledge as strictly confidential. *However, this provision obviously was intended to keep the records from prying eyes outside the circle in the ordinary course of business and, perhaps, to preserve bank secrecy. It could not have been intended to apply where the very fortunes of the partners were at stake.* Personal inspection was still open to Sturzenegger himself and to the representatives of the other partners." (Emphasis supplied)

There is not a scintilla of evidence in the record, even if every paper in the file is resorted to, to justify the construction which the lower court applied. The emphasized sentences in the foregoing are purely and entirely the creation of the trial judge.

it refers to a "pattern of control" over the Sturzenegger papers.

The foregoing is all that the lower court said upon the subject, and represents the totality that this Court may look to as from the "finder of the facts."

Now, let us see what this Court said on pages 9 and 10 of its opinion in relation to the foregoing.

First, it is stated that "we accept the express conclusions of Chief Judge Laws" as to control. But, we submit, the "express conclusions" cannot be accepted unless they are supported by the facts.

Secondly, it is stated that the conclusions "are set forth clearly and with sufficient fullness" in the February 19, 1953 opinion. Unless they appear in the six paragraphs, they are not there, and we submit that they are hardly "set forth clearly and with sufficient fullness" in those paragraphs. Thus, this Court abstains from elaborating "again the factual details." Indeed, appellant submits that the "factual details" have not been stated even once by the lower court.

Thirdly, in pointing to "the narration in Chief Judge Laws' opinion," this Court states that it "cannot be said by us to be erroneous." The "narration" may not be erroneous,[5] but the importance and force of the "facts" therein mentioned are wholly beside the point and have nothing to do with the question of appellant's "control" over the Sturzenegger papers.

Fourthly, this Court sums it all up by referring to Judge Laws' "thorough acquaintance with the case in its various steps over a period of years."[6] In this connection appellant refers the Court to the first full paragraph and foot-

---

[5] [This footnote is omitted.]

[6] [This footnote is omitted.]

note 4 on page 3 of the Reply Brief and footnote 22 on page 15 of the Reply Brief. Appellant adds that none of the exhibits to the Sturzenegger deposition—see volume IV of the Joint Appendix—were ever physically at the Court House—much less before the Judge—until the record was assembled for filing with this Court on this appeal. But, more importantly, we respectfully submit that Judge Laws' "thorough acquaintance" with the facts relating to "control" should be actually reflected by him in the record, and not merely assumed by this Court.[7]

Fifthly, this Court states that Judge Laws' "finding" rests upon a "discussion" of the evidence which traces the history of the close connection between appellant and the Sturzenegger Bank. Such "discussion" must be contained in the "six paragraphs," *supra*, for otherwise there is none, and we submit that such "discussion" as there is does not lead to a result of "control."

And lastly, this Court states:

> "For any purpose relevant to Rules 34 and 37 the findings are sufficient in form and definiteness; and, for purposes of our favorable review, find adequate support in the record."

The foregoing quotation suggests that findings for the purpose of Rules 34 and 37 may be less than for usual purposes. This seems hardly correct to appellant when the "findings" form the predicate for the drastic and final action taken in this case.

Appellant appreciates that an appellate court is not expected to cite "chapter and verse" when it states that a lower court's findings are supported by the record. However, it is respectfully submitted that a litigant is entitled, by way of an opinion or findings or some other judicial product, to know from some court the reasons underlying and justifying a judgment; and appellant submits that

[7] [This footnote is omitted.]

the proceedings in both courts leave unstated or undisclosed the facts upon which a determination could be made that it has "control" over the Sturzenegger papers.

The Special Master's Conclusion No. 10 (J.A. 547) has not been commented upon by either court. It is as follows:

> "10: The necessity under Swiss law for the waiver by parties—multiple or otherwise—who own the secrets contained in the Sturzenegger papers demonstrates that a holding of *prima facie* control of such papers by the plaintiff within the terms of Rule 34 F.R.C.P., does not fully resolve the problem. If the intervention of a third party, an independent agent, is necessary to produce the papers, then by definition plaintiff has no control over their production."

This was discussed at page 62 of appellant's main brief. If there were no other reason available, this point should be decisive of the entire matter. Appellant respectfully submits that the point deserved serious consideration, especially since it was obviously aimed at the lower court's decision of June 23, 1949, and was not adversely commented upon by Judge Laws when he ratified the Special Master's Report, Findings, and Conclusions in their entirety. *Standing alone, appellant submits, such a conclusion requires reconsideration of the decision of the division of this Court.*

The undersigned deliberately and seriously submit to this Court that, in view of the character of the proceedings below, and of the nature of the record which has been brought here, this case presents to this Court a travesty upon the administration of justice, the like of which it would be difficult to duplicate in the annals of Anglo-Saxon law.

There was no hearing below at which witness testified. Documents were referred to in briefs and memoranda,[8]

[8] [This footnote is omitted.]

and were neither offered in evidence nor shown to the District Judge. (See footnote 22 on page 15 of the Reply Brief).* Portions of depositions, referred to by the Government in its brief in this Court, were never called to the attention of the lower court. Exhibits to deposition—never identified by the deponent—were not even shown to the lower court, but are printed in this record—see volume IV of the Joint Appendix—in order to attempt to prejudice this Court against appellant.[2] This Court has seen depositions of Government witnesses (Merton, J.A. 1826; Euler, J.A. 1865; and Schmitz, J.A. 1908), although they were not offered in evidence below and no judge has had occasion to rule upon appellant's many objections appearing therein. Affidavits of Messrs. Sturzenegger and Germann (J.A. 396-397), touching squarely upon the ques-

---

* [Footnote 22 on page 15 of the Reply Brief in the Court of Appeals reads as follows:

> [22] Here is an excellent example of the presentation by appellees to the lower court in argument and briefs of "facts" which were not in the record. We call this Court's attention to appellees' brief below, entitled "Objections to Special Master's Report," etc. filed September 9, 1952, (R. 2838), and particularly page 6 thereof at R. 2843. In the first full paragraph on that page, reference is made to the "joint" telephone board. Cited in support thereof is "D-4423, January, 1937." Footnote 5 on that page stated that "Citations of this nature refer to documents produced by plaintiff from its files for inspection and copying by defendants." Such documents were not before the lower court. There are 29 of such citations on that page of appellees' brief below, none of which were actually before Judge Laws, except through the statements of appellees' counsel. Which ones of these affected the trial judge's decision?]

[2] In this connection, we refer to the phrase "on information now available" appearing upon page 10 of this Court's opinion, and the suggested relationship to "I. G. Farben and other German interests."

Some examples of such "exhibits,"—which have not even been *identified*—were *printed at the request of the Custodian*, and are found at J.A. 1705-1727. See Record 11153, 11159, 11421, 11538, 11545. The witness, when shown or asked about such documents or their contents answered that he did not know or recollect. See, e.g. R. 11161.

tion of "control", appear to have been totally ignored by Judge Laws. We asked the lower court to make findings so that both this Court and the parties could see precisely what the Judge was relying upon, but he refused to do so. It is just as important for the parties, as for the reviewing court, that adequate and proper findings be made. *Saginaw Broadcasting Company* v. *Federal Communications Commission*, 68 App. D.C. 282, 287, 96 F. 2d 554, 559, certiorari denied, 305 U.S. 613.

This Court speaks about Judge Laws tracing "the history of the close connection between I. G. Chemie and H. Sturzenegger & Cie.;" and implies that such tracing finds adequate support in the record (p. 10, slip op.). Where, appellant asks, is this found in the record? If the Swiss Compensation Office reports are relied upon for this (J.A. 205-324), appellant replies that the statements therein made were not evidence before the lower court.

We remind the Court of what it said in *Saginaw Broadcasting Company* v. *Federal Communications Commission*, *supra*:

> "The requirement that courts, and commissions acting in a quasi-judicial capacity shall make findings of fact, is a means provided by Congress for guaranteeing that cases shall be decided according to the evidence and the law, *rather than arbitrarily or from extralegal considerations;* and findings of fact serve the additional purpose, where provisions for review are made, *of apprising the parties* and the reviewing tribunal of the factual basis of the action of the court or commission, *so that the parties* and the reviewing tribunal may determine whether the case has been decided upon the evidence and the law or, on the contrary, *upon arbitrary or extralegal considerations.* When a decision is accompanied by findings of fact, the reviewing court can decide whether the decision reached by the court or commission follows as a matter of law from the facts stated as its basis, and also whether the facts so stated have any substantial sup-

port in the evidence. In the absence of findings of fact the reviewing tribunal can determine neither of these things. The requirement of findings is thus far from a technicality. On the contrary, *it is to insure against Star Chamber methods, to make certain that justice shall be administered according to facts and law.*" (Italics supplied).

Appellant submits that the phrases "arbitrary or extra-legal considerations," and "to insure against Star Chamber methods, to make certain that justice shall be administered according to facts and law," find an affinity in the sweeping and factually-unsupported "definite conclusion" of "control" reached by the lower court. We repeat that the six paragraphs in the lower court's opinion of February 19, 1953, heretofore analyzed, do not establish "control" and mostly do not even relate to the subject; they not only lack "definiteness" but are beside the point at issue; and the conclusion of "control" finds *no* support in the record.

* * * * * *